

IN THE
MISSOURI SUPREME COURT

NO. SC 84092

STATE OF MISSOURI, ex rel. SSM HEALTH CARE ST. LOUIS,

Relator,

v.

MARGARET M. NEILL, Circuit Court Judge, 22nd Judicial Circuit, Missouri,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS CITY
CAUSE NO. 012-1580

REPLY BRIEF OF RELATOR

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INTRODUCTION

This Reply Brief is submitted on behalf of Relator, SSM Health Care St. Louis, in response to Brief of Respondent and Brief of Missouri Association of Trial Attorneys (“MATA”) as *Amicus Curiae*. Respondent’s Brief and MATA’s *Amicus Curiae* Brief miss the mark in several regards. First, MATA completely ignores the fact that under any of the arguments suggested by Relator, venue would also be proper where the cause of action accrued.

Second, both Respondent and MATA mischaracterize Missouri case law on venue issues. Both Respondent and MATA cite inapplicable Missouri case law for the proposition that § 508.010 governs venue when a nonprofit corporation is sued along with an individual. No Missouri case has decided that issue and that is one of the central issues pending before this Court in this case.

Respondent and MATA misconstrue the holding of several cases involving venue. Respondent and MATA misread this Court’s holding in State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. banc 1962). In Bowden the Court sought to define the residence of a foreign corporation where the residence was not statutorily defined. The Court clearly looked to § 351.620, which required the foreign corporation to maintain a registered office and registered agent, and found that because a foreign corporation must maintain a registered office and registered agent, it should be deemed to reside there even though that statute did not expressly provide that a foreign corporation’s residence is where it maintains its registered office and registered agent. MATA argues that the foreign corporation’s residence was defined by statute, which is clearly erroneous, and

Respondent argues that the holding in Bowden centered around the Court’s interpretation of another inapplicable statute. The Bowden Court could not have been more clear than when it stated, “We . . . hold, as we must do, that a foreign business corporation ‘resides’ where its registered office and registered agent is located under Sec. 351.620.” Missouri nonprofit corporations, just as foreign corporations at the time Bowden was decided, are required to maintain a registered office and agent and, therefore, SSM should be deemed to “reside” where it maintains its registered office and agent.

Further, Respondent repeatedly and erroneously states that in Missouri where no statute defines a corporation’s residence, the corporation is deemed to reside where it has or maintains an office for the transaction of its usual and customary business. For this proposition, Respondent relies on State ex rel. Henning v. Williams, 359 S.W.2d 343 (Mo. banc 1939) and State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. banc 1991). The reasoning of this Court in both of those cases is that where a corporation’s residence is not defined by statute, the Court should consider where venue would be proper if the corporation was the sole defendant in the lawsuit to define residence. Henning, 359 S.W.2d at 565 and Rothermich, 816 S.W.2d at 200. As such, because a Missouri nonprofit corporation’s residence is not defined by statute, the Court should look to § 355.176 to define SSM’s residence under § 508.010 and not § 508.040.

Finally, Respondent and MATA argue that public policy favors placing venue anywhere the nonprofit corporation has or maintains an office or agent for the transaction of its usual and customary business regardless of whether any of the other defendants have venue contacts in that county. Respondent and MATA state that finding otherwise

would be confusing, complicated and would contort Missouri law. In fact the opposite result is true. Defining a Missouri nonprofit corporation's residence as any county where it maintains its registered office or registered agent provides the most simplified factual analysis for determining venue and eliminates the factual probing into where the nonprofit corporation maintains offices and agent for the transaction of usual and customary business.

POINTS RELIED ON

- I. Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because under Mo. Rev. Stat. § 355.176 (4) venue is improper in the City of St. Louis in that § 355.176 (4) is the exclusive venue statute for actions against Missouri nonprofit corporations, regardless of the presence of co-defendants, and Relator does not maintain its registered agent or principal place of business in the City of St. Louis and the cause of action did not accrue in the City of St. Louis.**
- II. Alternatively, Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because venue is improper in the City of St. Louis under Mo. Rev. Stat. § 508.010 in that the cause of action, if any, accrued in St. Charles County, Dr. Bucy, an individual defendant, resides in St. Charles County and SSM, a Missouri nonprofit corporate defendant, resides in St. Louis County as it maintains its *registered office* and *registered agent* in St. Louis County.**

III. Alternatively, Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because venue is improper in the City of St. Louis under Mo. Rev. Stat. § 508.010 in that the cause of action, if any, accrued in St. Charles County, Dr. Bucy, an individual defendant, resides in St. Charles County and SSM, a Missouri nonprofit corporate defendant, resides in St. Louis County as it maintains its *registered agent* and *principal place of business* in St. Louis County.

IV. Alternatively, Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because under Mo. Rev. Stat. § 508.010 venue is improper in the City of St. Louis in that venue cannot be established under § 508.010 solely because SSM, a Missouri nonprofit corporate defendant, might have an office or agent for the transaction of its usual and customary business in the City of St. Louis as SSM is a Missouri nonprofit corporation that maintains its registered agent and principal place of business in St. Louis County, Dr. Bucy, the individual defendant, resides in St. Charles County and the cause of action accrued in St. Charles County.

ARGUMENT

I. Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because under Mo. Rev. Stat. § 355.176 (4) venue is improper in the City of St. Louis in that § 355.176 (4) is the exclusive venue statute for actions against Missouri nonprofit corporations, regardless of the presence of co-defendants, and Relator does not maintain its registered agent or principal place of business in the City of St. Louis and the cause of action did not accrue in the City of St. Louis.

In the Briefs filed by Respondent and the Missouri Association of Trial Attorneys (“MATA”) as *Amicus Curiae*, Respondents and MATA argue that § 355.176 is not the exclusive venue statute when Missouri nonprofit corporations are sued. Respondent and MATA rely almost exclusively on cases involving for profit corporations and ignore the mandatory and exclusive language contained in the nonprofit venue statute, § 355.176.

First, Respondent and MATA, relying on State ex rel. Smith v. Gray, 979 S.W.2d 190 (Mo.banc 1998) set forth the proposition that when individuals and corporations are sued in the same suit, § 508.010 governs and under § 508.010 venue is proper where any defendant resides. Brief of Respondent at p.15 and *Amicus Curiae* Brief at p.13. This statement is true when *for profit* defendants and individuals are sued in the same suit. However, this statement is not applicable to Missouri nonprofit corporate defendants such as Relator, SSM Health Care St. Louis (“SSM”).

In support of this argument, Respondent cites only two cases involving nonprofit defendants. State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. 1994) and State ex rel. Steinhorn v. Forder, 792 S.W.2d 51 (Mo. Ct. App. 1991). While the Courts in Mummert and Forder analyzed venue under § 508.010 and transferred the cases out of the City of St. Louis, the issue before this Court was not raised in either of these cases. In fact, there is no case that has decided the issue of what statute applies when an individual and Missouri nonprofit corporate defendant have been named in the same lawsuit. Hence, neither of these cases are controlling and in fact have no persuasive authority with respect to the issue to be decided herein.

Second, the language of § 355.176 is both mandatory (“shall”) and exclusive (“only”). These words are strong and clear and evidence the legislative intent that § 355.176 is a special venue statute. Respondent and MATA argue that the language contained in § 355.176 is not exactly identical to the language contained in other mandatory statutes and, therefore, should not be construed as such. This is a weak argument. Section § 355.176 provides “suits against a nonprofit corporation **shall** be commenced **only**” in one of three locations. Section 508.050 provides, “Suits against municipal corporations as defendant or codefendant shall be commenced only” in particular locations. Section 508.060 provides, “all actions whatsoever against any county shall be commenced in the circuit court of such county” The language of § 355.176 is certainly not identical to the language of § 508.050 and § 508.060, but the language is similar in nature and should be given the same effect.

Notably, the language of § 508.050 is not identical to the language of § 508.060, yet the Courts have construed those statutes to have the same practical effect. While § 355.176 does not contain the *codefendant* language of § 508.050 or the *whatsoever* language of § 508.060, the *shall only* language of § 355.176 requires that the statute be given the same mandatory and exclusive effect as § 508.050 and § 508.060.

Respondent further argues that because § 508.040 contains the word *shall*, yet yields to § 508.010 in the presence of an individual defendant, § 355.176 should also yield to § 508.010 in the presence of an individual defendant. This argument completely ignores the fact that § 355.176 does not just state *shall* but also contains the word *only*. As previously set forth, § 355.176, with its *shall* and *only* language, is the exclusive venue statute for all suits instituted against a nonprofit corporation, regardless of the presence of other defendants.

Since SSM does not maintain its registered office or principal place of business in St. Louis City and the cause of action did not accrue in St. Louis City, venue in this matter is improper in the City of St. Louis. As such, this Court should make its preliminary writ permanent and order Respondent to transfer this case as required by § 355.176.

II. Alternatively, Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because venue is improper in the City of St. Louis under Mo. Rev. Stat. § 508.010 in that the cause of action, if any, accrued in St. Charles County, Dr. Bucy, an individual defendant, resides in St. Charles County and SSM, a Missouri nonprofit corporate defendant, resides in St. Louis County as it maintains its registered office and registered agent in St. Louis County.

Respondent fails to address the similarities between the nonprofit corporate statutes and general business statutes relating to the maintenance of a registered office and registered agent. MATA argues that the result reached by looking to other statutes contained in Chapters 351 and 355 is inappropriate because the Missouri Legislature repealed § 355.170 (2), which defined a nonprofit corporation's residence as where it maintained its registered office and registered agent. Because the Missouri Legislature has not explicitly provided a residence for Missouri nonprofits, the parties must look to the implicit nature of other statutes and Missouri case law to define a Missouri nonprofit corporation's residence. In defining the residence, it is appropriate to take into consideration statutes involving similar subject matter to shed light on the meaning of a statute being construed. Citizens Electric Corp. v. Director of Dept. of Revenue, 766 S.W.2d 450, 452 (Mo. banc 1989).

Interestingly, MATA does not complain that it is inappropriate to consider other statutes in defining the residence of a Missouri nonprofit corporation. Rather, MATA

argues that the result reached is inappropriate only because a nonprofit's residence would be defined the same as it was prior to the repeal of § 355.170. Had the Legislature intended for the residence to a Missouri nonprofit corporation to be defined differently, it certainly could have provided a different definition of residence. Absent a statutory definition, litigants must look to other statutes for guidance and should not be allowed to reject statutory analogies just because they are not satisfied with the result.

The requirements of Chapter 351 and Chapter 355 require that both nonprofit and general corporations maintain a registered agent and a registered office. These statutes are remarkably similar and clearly involve related subject matter. Therefore, “[w]hen the legislature enacts a statute referring to terms which have had other judicial or legislative meaning attached to them, the legislature is presumed to have acted with knowledge of that judicial action.” Citizens Electric Corp, 766 S.W.2d at 452. A Chapter 351 corporation is deemed to be a resident of the county where its registered agent and registered office are located for purposes of venue analysis under § 508.010 (Futrell v. Luhr Bros., Inc., 916 S.W.2d 348, 352 (Mo. Ct. App. 1996); n.2; State ex rel. Parks v. Corcoran, 652 S.W.2d 686, 688 (Mo. Ct. App. 1981)). Likewise, a Chapter 355 not-for-profit entity that has complied with Missouri statutes should be deemed to be a resident of the county where it maintains its registered agent and registered office.

This Court's holding in State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. banc 1962) supports this result. In Bowden, the Court was faced with defining the residence of

a foreign corporation.¹ The Court very clearly stated, “when a foreign business corporation wishes to do business in this state, it must comply with Sec. 351.620 RSMo 1959, V.A.M.S. and it seems to us that the very purpose of that section is to give the foreign business corporation a fixed, definite and certain location where a representative of the corporation may be found. In effect, compliance with the statute gives the corporation what in law amounts to a definite and fixed residence in this state.” The Court held that the only “legally sound, practical and satisfactory construction” of § 508.010 when considered with § 351.625 is that a foreign business corporation resides in any county where in maintains its registered office and agent as required by § 351.620. Id. at 350-351. Further, the Bowden Court found that such a construction conforms to good business practice, provides proper protection of the rights of individual defendants joined with corporate defendants and makes for certainty and definiteness as it eliminates the analysis of where a corporation maintains usual and customary business. Id. at 350.

Both MATA and Respondent completely mischaracterize this Court’s holding in Bowden. The Bowden Court did not as MATA and Respondent suggest base its holding on § 351.375, which defined the residence of domestic corporations, as incorporated by § 351.625.² The Court in Bowden makes clear that its holding is based on § 351.620,

¹ MATA, in its erroneous reading of Bowden, states that a foreign corporation’s residence is defined by § 351.375.

² In Bowden, the Court stated that their holding was *consistent* with § 351.375. Id. at 351.

which required that a foreign corporation maintain a registered office and registered agent in the State. Further, at the time Bowden was decided, there was no statutory definition of residence for a foreign corporation as MATA erroneously states.³

Following Bowden's clear reasoning, a Missouri nonprofit corporation should be deemed to reside where it maintains its registered office and registered agent as required by § 355.096 and § 355.161. As such, the nonprofit corporate defendant, SSM, is a resident of St. Louis County where it maintains its registered office and registered agent. As none of the defendants reside in the City of St. Louis, venue in this case is improper and this Court should make its preliminary writ permanent.

³ MATA's assertion that Relator is just "plain wrong" that at the time Bowden was decided no statutory definition of residence for a for profit corporation existed is specious. Clearly, MATA is the one who is just "plain wrong." At the time Bowden was decided, the closing sentence of § 351.375 defined the residence of a general, domestic corporation as where the corporation has or maintains its registered agent or registered office. Section 351.625, which was applicable to foreign corporations stated that any change in the foreign corporation's registered office or agent should be made consistent with § 351.375. Section 351.625 did not incorporate the definition of residence to a foreign corporation as MATA suggests.

III. Alternatively, Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because venue is improper in the City of St. Louis under Mo. Rev. Stat. § 508.010 in that the cause of action, if any, accrued in St. Charles County, Dr. Bucy, an individual defendant, resides in St. Charles County and SSM, a Missouri nonprofit corporate defendant, resides in St. Louis County as it maintains its registered agent and principal place of business in St. Louis County.

In its attempt to define the residence of a Missouri nonprofit corporation under § 508.010, Respondent and MATA completely mischaracterize the law. Respondent erroneously and repetitiously states that in the absence of a specific statute, the residence of a nonprofit corporation should be in any county where the corporation maintains an office or agent for the transaction of its usual and customary business. (*See* Respondent's Brief at 21, 23, 24, 25, 31). Respondent and MATA rely on State ex rel. Henning v. Williams, 131 S.W.2d 561 (Mo. 1939) and State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. banc 1991). However, these cases do not support Respondent's and MATA's position.

In Henning, the rationale of the Court is not that in the absence of a statute defining residence, a foreign corporation should be deemed to reside in any county where it maintains an office or agent for the transaction of its usual and customary business. What the Court in Henning did to define residence was look to where venue was proper when a foreign corporation was sued alone. Henning, 131 S.W.2d at 565. The Henning Court

noted that when a foreign for profit corporation is sued alone, under § 508.040, venue is proper where the corporation keeps an office or agent for the transaction of its usual and customary business. The Court stated, “we can see no reason why their residences should not be regarded as established in the same way when, perchance, they are joined as defendants with another. . . .” Id. at 565. Based on this reasoning, the Court held that a foreign for profit corporation resides where it maintains an office or agent for the transaction of its usual and customary business. Id.

This same rationale was followed in Rothermich in defining residence for a foreign insurance corporation. In Rothermich, the Court found that § 508.040 is applicable to foreign insurance corporation when sued individually. As such, the Court found § 508.040 to be persuasive in defining the residence of a foreign insurance corporation and held that for purposes of § 508.010, a foreign insurance corporation resides where it maintains an office or agent for the transaction of its usual and customary business. Rothermich, 816 S.W.2d at 200.

Respondent’s repeated assertions that in the absence of a statute defining residence, that a nonprofit corporation’s residence is in any county where the nonprofit corporation maintains an office or agent for the transaction of its usual and customary business is contrary to Missouri law.

Missouri case law requires that in the absence of a statutory definition of residence, the Court should look to where venue would have been proper had that defendant been the sole defendant in the lawsuit. In this case, had SSM, a Missouri nonprofit corporation, been sued alone, venue would have been determined under §

355.176. Therefore, SSM's "residence" should be defined under § 355.176 as any county where it maintains its registered office or principal place of business. Since SSM maintains its registered office and principal place of business in St. Louis County and Dr. Bucy resides in St. Charles County, venue is improper in St. Louis City. This Court should make its preliminary writ permanent.

IV. Alternatively, Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because under Mo. Rev. Stat. § 508.010 venue is improper in the City of St. Louis in that venue cannot be established under § 508.010 solely because SSM, a Missouri nonprofit corporate defendant, might have an office or agent for the transaction of its usual and customary business in the City of St. Louis as SSM is a Missouri nonprofit corporation that maintains its registered agent and principal place of business in St. Louis County, Dr. Bucy, the individual defendant, resides in St. Charles County and the cause of action accrued in St. Charles County.

Where the cause of action did not accrue in St. Louis City and the individual defendant does not reside in St. Louis City as enumerated in § 508.010, the nonprofit corporate defendant's venue contacts should be analyzed under § 355.176 and not § 508.010. Relator and MATA ineffectively argue that such a finding would be inconvenient, disorderly, confusing and complicated. That is just not the case. As set forth by MATA, the purpose of the venue statutes is to provide a convenient, logical and orderly forum for litigation. *See Amicus Curiae* Brief at 24. Requiring that the Court

first consider the venue contacts of the individual defendants under § 508.010 and if no venue contacts exist then analyzing the Missouri nonprofit corporation's venue contacts under § 355.176 is not complicated or confusing in the least. In fact, this analysis is much simpler than the analysis suggested by Respondent and MATA. Both Respondent and MATA ask this Court to find that venue is proper in any county where the Missouri nonprofit corporation has or maintains an office or agent for the transaction of its usual and customary business. This requires an incredible factual undertaking of deciding what is the corporation's "usual and customary business" and who are its "agents."

CONCLUSION

Relator respectfully requests that this Court make its preliminary Writ of Prohibition permanent, thereby precluding Respondent Judge Neill from taking any further action, other than to transfer the case to St. Louis County or St. Charles County, where venue is proper. Alternatively, Relator respectfully requests that this Court issue a permanent Writ of Mandamus requiring Respondent Judge Neill to order the transfer of this case from the City of St. Louis where venue is improper to either St. Louis County or St. Charles County where venue is proper and upon full hearing of all matters herein to make said writ absolute and to grant such other and further relief as this Court deems just and proper.

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CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Microsoft Word 97 by which it was prepared, contains 5,011 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block and the appendix.

The undersigned further certifies that the diskette filed herewith containing the Relator's Reply Brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served, via first class mail, postage prepaid, on this _____ day of March, 2002, to:

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